

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1459

To be argued by
AUDREY STRAUSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1459

UNITED STATES OF AMERICA,

Appellee,

—v.—

IRVING GOLDMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America*

AUDREY STRAUSS,
DANIEL J. BELLER,
*Assistant United States Attorneys,
Of Counsel.*



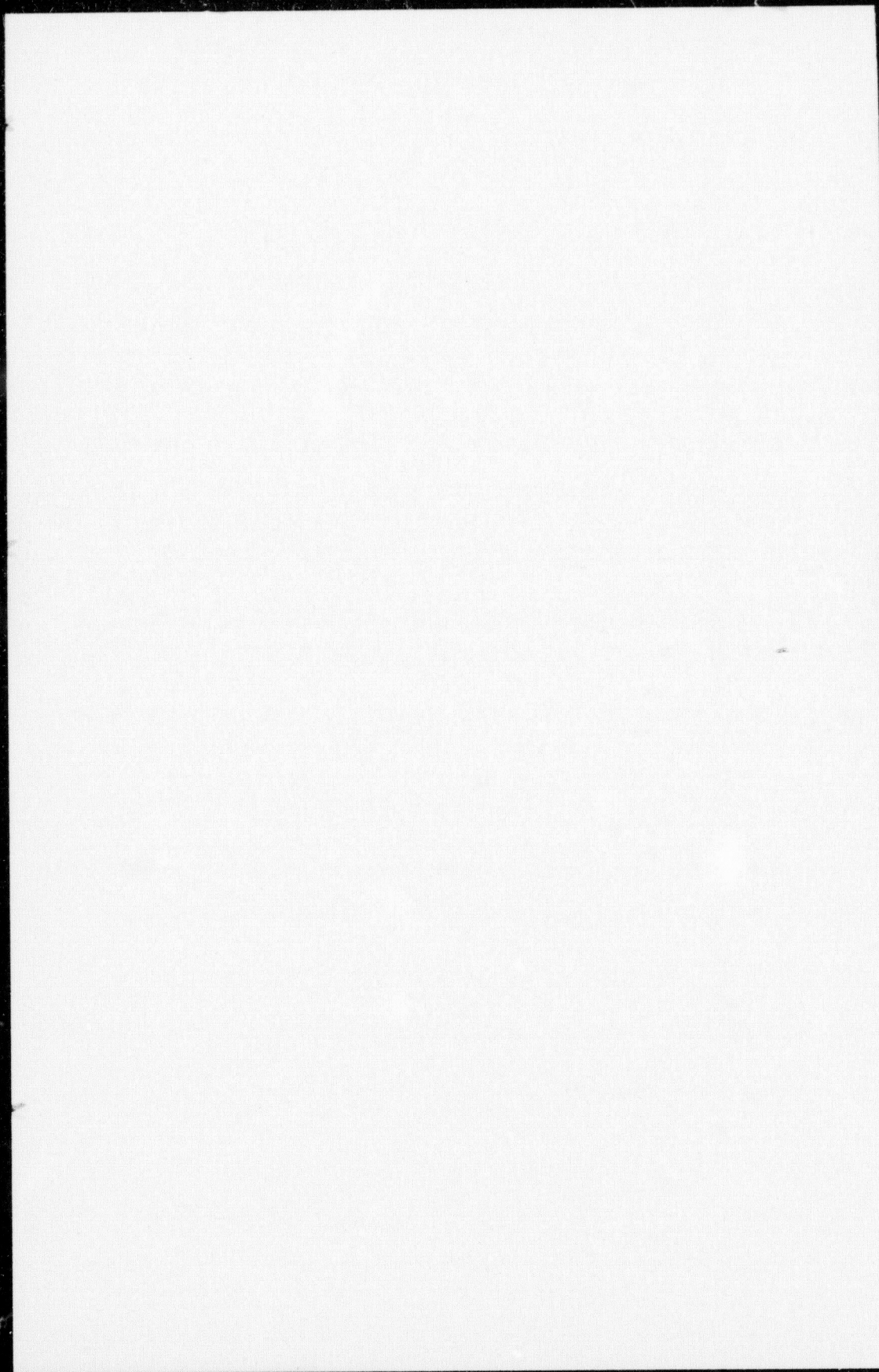


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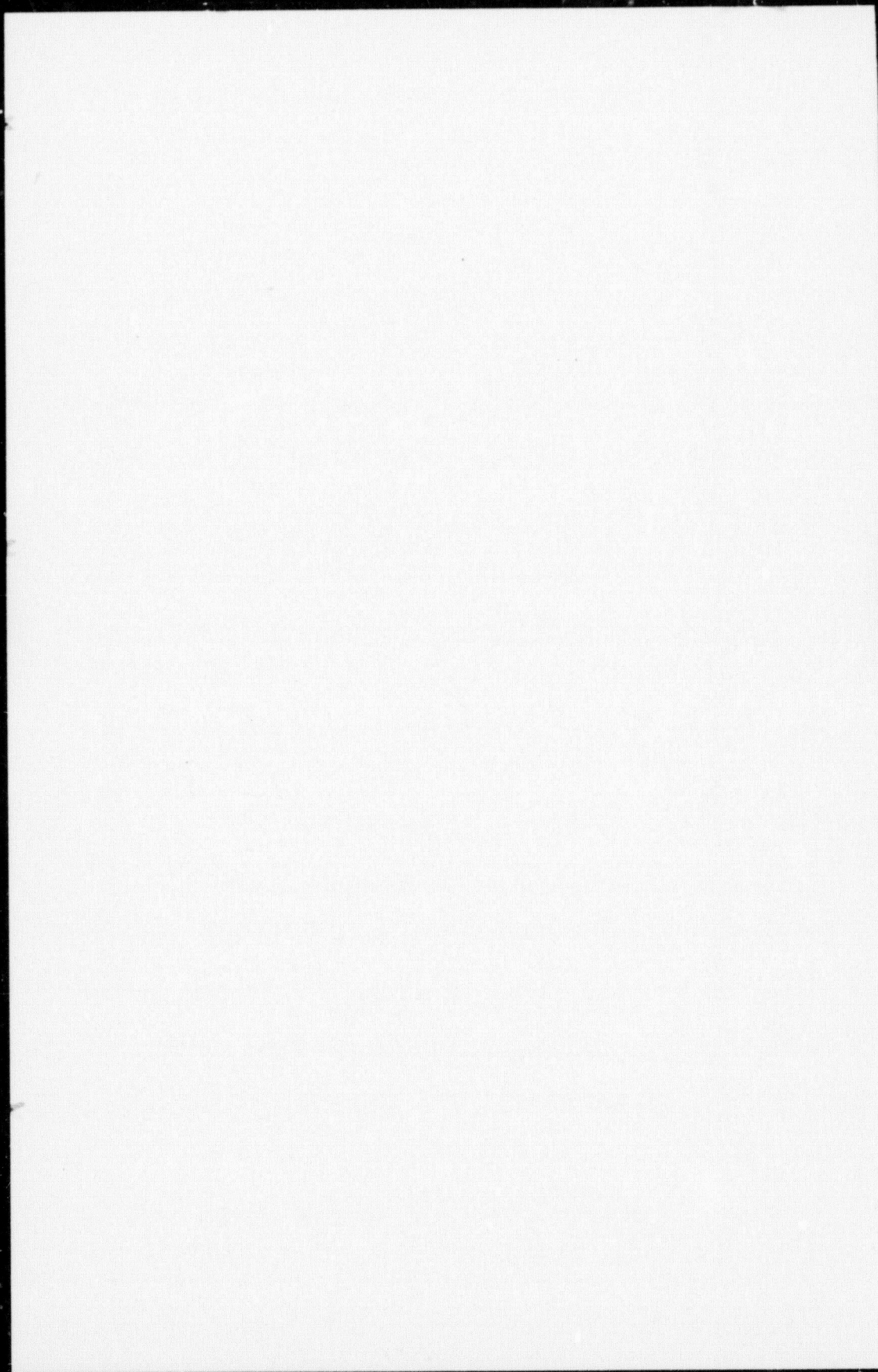
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—v.—

IRVING GOLDMAN,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Irving Goldman appeals from an order entered on October 28, 1977 in the United States District Court for the Southern District of New York by the Honorable Kevin T. Duffy, United States District Judge, denying a motion for dismissal of the indictment pending against him.

Indictment 75 Cr. 337, filed on April 1, 1975, charged Goldman with one count of conspiracy and forty-three counts of mail fraud. Count One alleged that Goldman, conspired to use the mails to defraud the New York City Transit Authority of the honest services of its employees by paying bribes and gratuities to a Transit Authority official. Count One further alleged that the defendant engaged in a conspiracy to defraud the Interborough News Co. by inflating its invoices and thereby diverting over \$200,000 of its profits to Jola, Inc., a corporation

which he controlled. Finally, Count One alleged that in connection with these transactions the defendant engaged in a conspiracy to defraud the Internal Revenue Service by filing false and fraudulent tax returns for Jola. Counts Two through Forty-four alleged substantive violations of the mail fraud statute, Title 18, United States Code, Section 1341. Specifically, Counts Two through Seven alleged mailings of checks and invoices used to generate the money to pay bribes and gratuities to the Transit Authority official. Counts Eight through Forty-four alleged mailings in furtherance of the scheme to defraud Interborough News Co. of its profits.

Trial commenced on August 23, 1977. On September 6, 1977 Judge Duffy granted a defense motion for a mistrial.

On September 28, 1977 the defendant moved for dismissal of the indictment, claiming that he had neither moved for, nor consented to a mistrial, and that a retrial of the case was therefore barred by the double jeopardy clause. He also asserted that he was entitled to dismissal because of a claimed violation of the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*

On October 28, 1977 Judge Duffy filed an opinion and order denying the motion. This appeal followed.

Facts

A. The Government's Case Presented Prior to the Declaration of a Mistrial

Before the District Court granted a defense motion for a mistrial, the Government had presented its first witness, William Lynch, and the testimony of its second witness, Jack Zander, had reached the stage of redirect examination. The testimony of these two witnesses provided a

good picture of the scheme in which the defendant, Irving Goldman, had engaged.

1. The Testimony of William Lynch

Lynch testified that he had been an employee of the Interborough News Company ("Interborough") for 34 years. For many years, Interborough supplied candy for the vending machines in the New York City subways under a contract with the New York City Transit Authority. In 1963, Interborough was purchased by a Buffalo company, Sportservice, Inc. ("Sportservice"). Sportservice designated one of its own executives, Jack Zander, to head Interborough. However, Zander worked primarily in Buffalo and the day-to-day operations of Interborough were placed in the hands of Lynch, who became Interborough's operations manager. (Tr. 4-7).*

As operation's manager, Lynch initially followed normal operating procedures in purchasing the candy which Interborough sold to the public through the subway vending machines. He would order candy in large quantities from candy manufacturers; the manufacturers would ship the candy to Interborough and bill Interborough; Interborough would send the bills to its parent company, Sportservice, for payment. Because of its large-volume purchases, Interborough received favorable price and quantity discounts, including certain amounts of free merchandise, from most candy suppliers. (Tr. 8-9).

For reasons that Jack Zander did not reveal to William Lynch, in 1967 Zander instructed Lynch to alter these normal business procedures. At that time Zander told Lynch to direct some candy manufacturers to send the bills for Interborough's candy to the Jola Candy Co.

* "Tr." refers to the trial transcript; "GX" refers to government exhibit; "App." refers to appellant's appendix; "Br. "G" refers to appellant's brief.

("Jola"), a company run by Irving Goldman. Lynch complied and, thereafter, invoices sent by Interborough's candy suppliers to Jola were paid by Jola. However, Jola then sent its own invoice to Interborough, charging Interborough at a higher, marked-up price for the same candy that was still ordered by Lynch and delivered by the candy manufacturer directly to Interborough. Lynch knew of no service which Jola rendered in Interborough's purchasing of candy that would warrant the mark-ups. As an honest and faithful employee of his company, Lynch protested to Zander about the arrangement, which grew more extensive and absorbed ever-increasing percentages of Interborough's profits. Zander turned a deaf ear to Lynch's protests. (Tr. 9-18; GX 22-44, GX 22A-44A, GX 22B-44B).

2. The Direct Testimony of Jack Zander

Zander's direct testimony revealed part of the reason for his willingness to permit Jola to drain Interborough's profits. In 1967, to induce Zander to permit him to skim Interborough's profits, Goldman told Zander "he would like to work out something that would benefit me [Zander] personally financially." (Tr. 113). Subsequently, in 1969 Irving Goldman made Jack Zander's two children 50% shareholders of Jola. (Tr. 124-25). Goldman's own two children held the other 50% interest in Jola. (Tr. 119-20). Thus, the monies drained from Interborough were being annually distributed to the Zander and Goldman children. From 1969 to 1974, Zander's children received about \$100,000, (GX 45-H, 45-I, 45-L, 45-M, 45-R, 45-S, 45-T, 45-U, 45-QQ, 45-RR), and Goldman's children received the same. Not surprising, during the period of the scheme the owners and shareholders of Interborough were not informed that Zander had been corrupted by Goldman and that Zander was using his fiduciary position at Interborough to line both his and Goldman's pockets. (Tr. 181-8).

Zander also testified that during this same period, Goldman used personal contacts to oil the relationship between the New York City Transit Authority and Interborough. (Tr. 95-103). Most significantly, during the same time that Goldman and Zander were skimming Interborough's profits, Interborough's operations were only marginally profitable and headed toward foreseeable losses in future years. (Tr. 119). When Zander told Goldman that Interborough might become too unprofitable an operation to continue, Goldman went to work helping Zander obtain a rent reduction from the Transit Authority. (Tr. 128-36). However, Goldman told Zander that if the rent reduction was obtained, it would be primarily through the efforts of Goldman's friend, a Transit Authority official named Seymour Wasserberger. Goldman told Zander that they "should definitely show [their] appreciation." (Tr. 136). The Transit Authority approved a \$600,000 reduction in rent for Interborough. (Tr. 137). At the end of that year Goldman informed Zander that their appreciation to Seymour Wasserberger would take the form of \$5,000. (Tr. 139). A phony invoice from Jola to Interborough, purporting to represent a billing for services rendered, was then settled upon as the vehicle to generate the money for the payoff. (Tr. 139; GX 2, 2-A, 2-B). Similar phony invoices were used in the following two years to generate money to pay Wasserberger \$500 Christmas gratuities. (Tr. 145-53; GX 4, 5, 5-A, 5-B, 6, 7, 7-A, 7-B).

B. Events Leading to the Declaration of a Mistrial

Following less than two half days of direct examination, the defense commenced a three-and-a-half day cross-examination of Jack Zander. During that cross-examination, Zander testified to two matters as to which, on re-direct examination, he sought to correct his testimony.

First, Zander was questioned on cross-examination about any monies he received other than his salary from Sportservice. He admitted that in 1966 he had received \$30,000 from a Mr. Altman who had sold an amusement park to Sportservice. (Tr. 303-04). However, Zander described that \$30,000 as a gift that arrived after the business deal had been consummated and that was unrelated to the sale of the amusement park. (Tr. 309).

Second, on cross-examination Zander was asked if he had received any monies in connection with his position at Sportservice, beyond those which he had already described. Zander denied receiving any other monies. (Tr. 315).*

Cross-examination ended shortly before the Labor Day weekend. On Labor Day, in the afternoon, Zander met with the prosecutor and as a result of that meeting, when he resumed the stand on Tuesday morning for redirect examination, he told the jury that he wanted to correct some of the testimony that he had previously given in the trial. (Tr. 709-10).** First, as to the money re-

* On November 17, 1977, Zander entered a plea of guilty to a one count information charging that he committed perjury when, in this answer on cross-examination, he denied that he received any monies other than those which he previously described. The defendant's brief incorrectly states that Zander pled guilty to a charge that he committed perjury in his direct examination. (Br. 3, footnote).

** The defendant's brief faults the Government for purportedly failing immediately to notify the court of Zander's desire to correct two matters as to which he had previously testified. (Br. 12, footnote). Since the Government first discussed this with Zander on the afternoon of Labor Day, and the matter was brought to the attention of both the District Court and the jury as soon as the proceedings resumed the following morning, it is difficult to imagine how the matter could have been handled more expeditiously.

ceived from Altman, Zander now admitted that at the outset of the negotiations for the amusement park, Altman had promised to take care of him if the deal which they consummated was a good one. (Tr. 710).

Most significantly, on redirect examination, Zander admitted that he had answered untruthfully on cross-examination when he had denied receiving other monies in connection with his position at Sportservice. (Tr. 711-12). For the first time, Zander revealed that long before his children had become stockholders of Jola, Goldman had been giving Zander cash. Indeed, before Jola was formed, Goldman did business with Interborough through a company called "U. S. Candy Company." William Lynch had previously told the jury that he had purchased unsatisfactory merchandise, such as damaged candy, from this company upon Zander's orders. (Tr. 69-70). Zander now explained this mystery by admitting that Goldman had given Zander a cut of the proceeds from U. S. Candy's dealings with Interborough. (Tr. 714-16). Zander also revealed that when Jola was first formed in 1967—two years before Zander's children were made shareholders—Goldman made precisely the same deal with Zander, namely, Goldman promised to give Zander cash payments in exchange for Zander's agreement to permit Jola to get a mark-up on Interborough's candy orders. (Tr. 716-718). Thus, long before Zander's children became shareholders in Jola, Goldman was making regular cash payments to Zander that successfully caused Zander to sacrifice the interests of Interborough for both Goldman's and Zander's personal gain.

After Zander made these admissions to the jury, the prosecutor attempted to elicit the circumstances under which Zander had revealed these facts to the Government on the previous day. Upon being asked what consequences Zander expected as a result of the perjury which he had committed, Zander replied, "after I had got all

done, you indicated that I could possibly be indicted . . . for perjury." (Tr. 730). The Government thereafter requested that the witness be declared hostile and that the Government be permitted to cross-examine him to demonstrate that, contrary to his testimony, Zander had made almost all of his admissions to the Government after he was informed that he would be indicted for perjury. (Tr. 731-33).

Redirect examination was resumed. The prosecutor cross-examined Zander on the basis of notes made on the previous day detailing the discussion that led to Zander's confession that he had committed perjury at the trial. In the course of establishing the precise exchange that led to Zander's confession the following questions were asked and answers given:

"Q. Do you remember saying to me then 'What if Mr. Goldman says I received cash?'

A. Yes.

Q. And do you remember my telling you that you shouldn't count on the fact that it would be one on one, your word against his?

A. Well—yes, you made that comment.

Q. And do you remember at that point you told me that you had received \$1500 or so of cash from him? Do you remember that?

A. \$1500?

Q. \$1500, Mr. Zander. Do you remember saying that at that time?

A. I received various sums. I don't remember—I don't know which incident you are referring to.

Q. What did you tell me initially? How much cash did you—

A. Oh, the initial thing I ever received was through U.S. Candy.

Q. Mr. Zander, when she said to you that you should not count on going one on one, your word against Mr. Goldman's word, and I asked you did you receive any cash from Mr. Goldman, and you said to me that you did, do you recall you told me at that point—

A. Yes." (Tr. 737-38).

At that point in the proceedings, defense counsel requested to approach the side bar. A recess was taken while counsel and the court proceeded to the robing room for a conference. Defense counsel's statement to the Court began as follows:

"If your Honor please, one question came in and I didn't rise to object to it. The second one has just come now.

"What Ms. Strauss is doing as part of the sanitation process, whether she intends it or not, is to force a mistrial. What is happening is she is talking about one on one, that is to say Zander against Goldman, when she knows very well that there is a question about whether Goldman will take the stand or—" (Tr. 738-39)."

The Court responded as follows:

"Listen, I was there. I watched it. I heard it. I was surprised you didn't object." (Tr. 739).

Although defense counsel initially argued that the prosecutor's comment may or may not have been intentional, the robing room conference proceeded with defense counsel's argument that the phrase "one on one" was deliberately used by the prosecutor to provoke a mistrial. The District Court disagreed, stating that the comment

was inadvertent. (Tr. 739). The prosecutor then argued that the implication of the phrase "one on one," in the context of the question asked, was not to call on Goldman to take the stand in this case but related to accusations that Goldman might make subsequent to this case. (Tr. 740). After further argument by the prosecutor about the implication of Zander's confession that Goldman was giving him cash payoffs for many years and the implication, in the context of the question, of the phrase "one on one," the District Court stated that it believed that the jury would understand the comment as calling for the defendant to take the stand. (Tr. 742). The prosecutor's suggestion of a curative instruction was rejected by both the court and defense counsel. (Tr. 742). The court then stated that it was a matter which was "close to the line," but that "it is not intentional." As this conference drew to a close, defense counsel stated, "it doesn't have to be malicious to be prejudicial." (Tr. 742-43).

After a recess, counsel and the court met again. Defense counsel's initial statement revealed that during the recess he had conferred with the defendant about his request for a mistrial and the prospect of a retrial. At that point defense counsel asked, for the first time, that the indictment be dismissed. (Tr. 746). The Court responded: "Good try, but, no I can't. Look, I am sympathetic towards the man, all right. A mistrial, yes, dismissal there is insufficient here if we went through the entire thing. . . ." (Tr. 746). Defense counsel replied, "Your Honor makes the rulings, I make the applications and I gave the reasons that I see fit."

Judge Duffy then took the bench and announced the following: "There is an outstanding motion, a motion for a mistrial. The motion is granted." (Tr. 747).

After the District Court announced the granting of the motion for a mistrial, the Government sought an

opportunity to reargue the motion. The court held the jury to permit the Government to do so, but, after argument and a second request by the Government for a curative instruction, the court declined to change its ruling. (Tr. 750-55).

In view of the court's decision, the Government then asked whether the retrial would begin immediately. The court replied: "I will set a trial date but I will not do it right now." Defense counsel, clearly content with the result, brought the conference to an end stating, "Thank you, your Honor." (Tr. 755).

C. The District Court Opinion

Although on the day that the mistrial was declared the defendant never once suggested that a retrial would be barred by the double jeopardy clause, three weeks after the mistrial was declared, he moved to dismiss the indictment on grounds of double jeopardy. Following submissions and oral argument by all parties, on October 28, 1977 the District Court filed an opinion and order denying the defendant's motion to dismiss the indictment on grounds of double jeopardy. After reviewing in detail the events leading to the declaration of the mistrial, Judge Duffy concluded that "the record clearly establishes what I continue to perceive as a defense motion for a mistrial; at the very least, it demonstrates defense consent thereto." (Opinion at 8).*

As to its determination that the defense moved for a mistrial, the District Court relied on the fact that the defense raised the issue of the mistrial in the first robing

* The District Court opinion appears at page 731 of appellant's appendix.

room conference and that defense counsel's own understanding that he had moved for a mistrial was reflected in his subsequent comment "that defendant would face a second trial 'if a mistrial be *granted*.'" (Opinion at 9). Judge Duffy further noted his own comments during the robing room conferences and in open court reflected his belief that a defense motion for a mistrial was before him.

The opinion then went on to demonstrate that "[e]ven if the record were construed as failing to support my continued perception of an express motion, clearly it evidences defense counsel's consent to a mistrial." (Opinion at 9). Specifically, Judge Duffy emphasized that defense counsel had urged the necessity of a mistrial, objected to the Government's request for a curative instruction, and acknowledged that the granting of a mistrial would cause the defendant to face a second trial. Moreover, Judge Duffy noted that when he announced that he was granting an outstanding motion for a mistrial, defense counsel "failed to disabuse me of that view although he had ample opportunity to do so." (Opinion at 9).

Finally, the District Court rejected defense claims that the mistrial had been deliberately provoked by the Government, commenting that the record was replete with its findings that the error was unintentional. (Opinion at 10).

ARGUMENT

POINT I

The Defendant Moved For, Or Consented To, a Mistrial and, Accordingly, the Double Jeopardy Clause Does Not Bar Retrial.

The defendant attempts to convince this Court that he neither moved for, nor consented to, the mistrial. In the alternative, he claims that even if there was a defense motion or consent to the mistrial, his double jeopardy claim should be upheld on the ground that the Government deliberately sought the mistrial. Each of these claims is founded on selective and fanciful interpretations of the record. Contrary to the defendant's arguments, the record amply supports the District Court's conclusions that the defense moved for, or at the least, consented to the mistrial and that the Government had no intention of provoking a mistrial.

The defendant's double jeopardy arguments are to be evaluated within the well-established principle that the double jeopardy clause does not bar retrial where a mistrial is declared at the request of the defendant. As Justice Harlan stated in *United States v. Jorn*, 400 U.S. 470, 485 (1971):

"Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

Accord *United States v. Lee*, 45 U.S.L.W. 4661, 4663 (U.S., June 13, 1977); *United States v. Dinitz*, 424 U.S. 600, 607-08 (1976); *United States v. Tateo*, 377 U.S.

463, 467 (1964). The theory of these cases is that the defendant's request for a mistrial constitutes a waiver of the double jeopardy claim and such a waiver will be found where the defendant explicitly asks for the mistrial, *e.g.*, *United States v. Pappas*, 445 F.2d 1194 (3rd Cir.), *cert. denied*, 404 U.S. 984 (1971), or where he consents, whether expressly or impliedly, *e.g.*, *United States v. Goldstein*, 479 F.2d 1061 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973).

A. The Defendant Moved For, Or At The Least, Consented To The Mistrial

As the District Court's opinion makes clear, Judge Duffy declared a mistrial believing that he was granting a defense motion for that relief. The record demonstrates that Judge Duffy had every reason to believe that a defense motion for a mistrial was before him. The question of a mistrial arose only after defense counsel claimed there was a need for a mistrial. Defense counsel raised this prospect when, in objecting to a question which he characterized as a reference to the defendant taking the stand, he argued that the effect of the question, whether the Government intended it or not, was "to force a mistrial." (Tr. 738).

Before defense counsel raised the claimed need for a mistrial, no one else had done so. Indeed, the District Court's disinclination to act *sua sponte* was demonstrated at that very time since, as the District Court later noted, it had noticed the first instance when the prosecutor used the phrase "one on one" but had taken no action when defense counsel failed to object. (Tr. 739). If there were any doubt about the fact the defendant had moved for a mistrial, defense counsel's statement at the outset of the second robing room conference recorded defense counsel's own understanding that he was seeking a mistrial and therefore, it being the defendant's motion, retrial would be permitted. To this effect, defense counsel

raised with the District Court his concern that the defendant "would face the prospect *if a mistrial be granted* of standing two trials." (Tr. 745). (Emphasis added). By so stating, defense counsel made explicit his own understanding that having moved for a mistrial, he had waived the double jeopardy objection to a second trial.

Subsequently, the court took the bench and noted that there was "an outstanding motion, a motion for a mistrial" and then granted the motion. This statement unequivocally recorded the District Court's understanding that a motion for a mistrial had been made. The Government thereafter sought and obtained an opportunity to reargue the motion. Defense counsel never once disabused the District Court of what it obviously believed to be the case, namely, that the defendant had moved for a mistrial.

Although on this record it is apparent that the District Court justifiably understood itself to be granting a defense motion for a mistrial, assuming *arguendo* that there was no motion, the defendant's consent to the granting of the mistrial entirely resolves the instant double jeopardy claim. The consent is apparent from defense counsel's urging of the need for a mistrial (Tr. 738); his objection to a curative instruction (Tr. 742); his acknowledgment that if a mistrial were granted, the defendant would face the prospect of a retrial (Tr. 744-45); his vocal acquiescence in the court's announcement that it would not dismiss the indictment but that it would grant a mistrial (Tr. 746); his failure to dispute the court's announcement that it was granting an "outstanding motion" for a mistrial (Tr. 747); his failure to object to the granting of the mistrial during the entire third conference while the jury remained available and the Government registered its strenuous opposition, after which the court adhered to its ruling and defense counsel thanked the court. (Tr. 748-55). Moreover, defense counsel did not question the court's statements that a new trial date would be set. (Tr. 755).

Defense counsel's actions and statements in this case surpass every standard of consent to a mistrial applied in this Circuit. In *United States v. Gentile*, 525 F.2d 252 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976), Judge Friendly found it sufficient that defense counsel led the District Judge to the brink of declaring a mistrial by urging vigorously that the prosecutor's opening was extremely prejudicial. Although the defense attorney later explicitly stated to the District Court that he did not consent to a mistrial, Judge Friendly found that this was not enough. Here, of course, defense counsel first raised the need for a mistrial and never at any point suggested that he did not want a mistrial.

In *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975), the District Court declared a mistrial on the grounds that the jury was hopelessly deadlocked. The defense had not moved for a mistrial and, indeed, after the District Court indicated that it would discharge the jury, the defense asked that the jury be charged on burdens of proof. This Court rejected defendant's double jeopardy claim, finding that the defendant had failed to make its objection to the discharge of the jury explicit to the District Judge, and observed the following:

"Although the defense was not totally still, it was silent on the prospect of a mistrial and nothing was said to dispel the inference of accord." 516 F.2d at 909.

Here, of course, defense counsel not only failed to dispel the inference of accord: he raised the need for the mistrial, he acknowledged the prospect of a retrial if the mistrial were to be granted, and he expressed acquiescence in the Court's decision to grant the mistrial. In addition, he never suggested in any way, before or after the granting of the motion, that the defendant wanted the trial to proceed. Finally, he greeted the Court's statement that a new trial date would be set with nothing less than an expression of gratitude.

Goldman's reliance on *United States v. Grasso*, 552 F.2d 46 (2d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3781 (May 31, 1977), is misplaced. In *Grasso*, twenty-two days after the commencement of a trial for income tax evasion, and just prior to the testimony of the Government's final rebuttal witness, defense counsel advised the court that the Government's principal witness had recanted his testimony in a jail-house interview with the defense attorney the previous night. Counsel moved for a dismissal of the indictment. After two days of hearings the court found "manifest necessity" for the declaration of a mistrial and aborted the trial *sua sponte*. *Id.* at 50. Indeed, the defendant noted that he disagreed with the court's decision to declare a mistrial. *Id.* at 49. In view of the circumstances of the case, in which the defendant expressed his disagreement with the mistrial, sought only a dismissal of the indictment or a judgment of acquittal, and even the district judge perceived that the mistrial had been declared *sua sponte*, no consent could be found. Here, Goldman asked for the mistrial, understood that the court perceived his motion as a motion for mistrial, discussed with the court the likelihood of a retrial and ultimately thanked the court for granting the mistrial. In the context of this case, Goldman's insistence upon and satisfaction with the mistrial is clear.*

* Moreover, the Court found in *Grasso* that the event precipitating the mistrial did not prejudice the defendant and therefore the mistrial was not in the defendant's interest. *Id.* at 51, n.1. Where the event precipitating the mistrial does not in itself prejudice the defendant, consent will not lightly be imputed to the defendant. Here, however, Goldman repeatedly alerted the Court to what he perceived to be the prejudice to him of the prosecutor's remarks. Since the mistrial was "granted in the sole interest of the defendant" retrial is not barred by double jeopardy. *United States v. Gori*, 367 U.S. 364, 369 (1961); *United States v. Gentile*, *supra*, 525 F.2d at 255-58.

B. The Government Did Not Deliberately Seek A Mistrial

The defendant also argues that even if he moved ~~t.r.~~, or consented to, the mistrial, his double jeopardy claim should be upheld on the ground that the Government intentionally provoked the mistrial. Judge Duffy rejected this contention, stating that the record was replete with his findings that the Government was not seeking a mistrial. Those findings were amply supported.

There can be no doubt but that the prosecutor made every effort to persuade the court to deny the mistrial motion. The Government argued vigorously that, as a logical matter, the jury would not view the prosecutor's question as calling upon Goldman to take the stand in his trial since, to contradict Zander on the relevant point, Goldman would have to admit making cash payments to Zander. As the prosecutor repeatedly emphasized to the District Court, any such testimony by Goldman would be an admission of his guilt and no one would expect him to take the stand in this case to give such testimony. (Tr. 740-42, 750, 752, 753, 755). Moreover, the Government twice sought to have the court give curative instructions to alleviate any need for a mistrial, suggestions in which the defense declined to join. (Tr. 742, 753). Finally, even after the District Court announced the declaration of the mistrial in open court, the Government asked the court to hold the jury so that the declaration of a mistrial could be reconsidered. (Tr. 748). The District Court granted that request and the Government made every attempt to persuade the court to alter its decision. On this record, it is apparent that the Government did not want a mistrial to be declared.

In the face of this clear record, Goldman argues that the Government was engaged in a scheme to cause a mis-

trial because its case was damaged by Zander's admissions of perjury. To bolster this contention, the defendant attempts to leave this Court with the impression that Zander's redirect testimony badly damaged the Government's case. To this effect, the defendant's brief asserts that Zander "admitted that virtually his entire direct (and substantial portions of his cross) examination was a lie." (Br. 19). Similarly, the brief claims that Zander admitted "gross perjury infecting virtually his entire direct and cross-examination. . . ." (Br. 12). These claims are misconceived. Rather than undercutting his direct testimony, Zander's redirect in effect strengthened that earlier testimony which was deficient only in that it failed to reveal that the criminal venture started with Goldman giving Zander cash payments for several years before Zander's children became shareholders in Jola. Undoubtedly, the defense would have made much of Zander's admission that he was untruthful when he failed to reveal these cash pay-offs during cross-examination on the subject. However, the Government was in a position to argue that Zander, who had otherwise been immunized, would now be prosecuted for perjury, that Zander ultimately told the truth, and that, in any event, to the extent that Zander lied to protect himself, his lies had been helpful to Goldman.

Thus, contrary to the impression that defendant's brief attempts to create, the Government had no reason to seek an abortion of the trial. With the redirect examination of Zander, the evidence of Goldman's guilt was enhanced, not diminished. It is therefore not surprising that, far from provoking a mistrial, the Government made every effort to have the trial continue in the face of the defendant's ultimately successful effort to have it end before the question of his guilt could reach the jury.

POINT II

There Is No Jurisdiction to Review the Defendant's Speedy Trial Claim.

Goldman attempts to utilize his pre-trial appeal on double jeopardy grounds as a vehicle for obtaining review of his further claim that there has been a violation of his rights under the Speedy Trial Act. We submit that this Court should not reach the speedy trial issue since there is no jurisdiction for an interlocutory appeal of a pretrial order denying a speedy trial claim.

In presenting his speedy trial claim, the defendant deals with the question of jurisdiction in a short footnote (Br. 23) which cites *United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3822 (June 21, 1977).^{*} In *MacDonald*, the Fourth Circuit found jurisdiction for an interlocutory appeal of a Sixth Amendment speedy trial claim because it was "pendent" to a double jeopardy claim which was reviewable pretrial. Apparently attempting to utilize this theory of pendent jurisdiction, the defendant asserts that the statutory speedy trial claim which happened to be raised at the same time as his double jeopardy claim is presently reviewable. In the same vein, he takes the position that a speedy trial motion denied at an earlier stage in the proceedings "is not now on review." (Br. 23, footnote).

Although *Abney v. United States*, 431 U.S. 651 (1977) is cited earlier in the defendant's brief (Br. 1), his brief fails to mention the fact that *Abney* specifically rejected this theory of "pendent" jurisdiction. In *Abney*, the

^{*} The *MacDonald* case was argued before the Supreme Court on January 9, 1978.

Supreme Court held that a pretrial order denying a motion to dismiss an indictment on grounds of double jeopardy is a "collateral order" immediately appealable under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). However, the Court went on to emphasize that "we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well." 431 U.S. at 663. The Supreme Court then found that there was no jurisdiction to review by interlocutory appeal a challenge to the sufficiency of the indictment which had been raised along with the double jeopardy issue in that case. *See also United States v. Cerilli*, 558 F.2d 697 (3d Cir. 1977) (where, on the authority of *Abney*, the Court held that there was jurisdiction to review double jeopardy claims on an interlocutory appeal, but there was no jurisdiction to review claims relating to prosecutorial misconduct and the statute of limitations).

Apart from the fact that the *MacDonald* opinion's theory of pendent jurisdiction was rejected in *Abney*, and apart from the question of whether *MacDonald* will survive Supreme Court review, it is apparent that the Fourth Circuit's decision on *MacDonald* provides no basis for permitting an interlocutory appeal of Goldman's instant speedy trial claim. In finding jurisdiction for the interlocutory appeal in *MacDonald*, the Fourth Circuit accorded great weight to the fact that the defendant was raising a Sixth Amendment speedy trial issue, which it characterized as a "fundamental constitutional right." 531 F.2d at 199. Here, Goldman attempts to obtain review of a statutory claim under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, the provisions of which do not presently entitle him to any relief even if a violation of the Act has occurred. *United States v. Carini*, 562 F.2d 144 (2d Cir. 1977). The *MacDonald* opinion is further limited by its own assertion that the case presented there was an extraordinary one and review of speedy trial

claims should ordinarily await the final judgment in the case. 531 F.2d at 199. Thus, even if there are some extraordinary cases where interlocutory appeals of constitutional speedy trial claims should be permitted, as *MacDonald* suggests, there is no basis for immediate review of Goldman's statutory speedy trial claim which, even if found to be meritorious, would not obviate the need for the retrial to proceed.

In relying only on *MacDonald* and its theory of pendent jurisdiction, the defendant has eschewed the broader position that any speedy trial issue is reviewable pretrial as a "collateral order" under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, *supra*. Should that position now be asserted, this Court should firmly reject it. Although the Supreme Court decided in *Abney* to apply that doctrine to permit interlocutory appeals of double jeopardy claims, its decision to do so was based on the "special considerations permeating claims of that nature which justify a departure from the normal rule of finality." 431 U.S. at 663. Specifically, the opinion explained at length that the essence of the double jeopardy clause is to protect an individual from being tried twice for the same offense. If the double jeopardy clause has been violated, requiring the second trial to proceed prior to appellate review of the defendant's claim irretrievably deprives him of the constitutional protection which he is guaranteed.

By contrast, speedy trial rights do not embody any guarantee against standing trial. Like many other legal claims which may ultimately upset a conviction upon review, the right is not irretrievably lost if interlocutory review is denied. Of course, as the Supreme Court emphasized in *Abney*, "[a]dherence to the rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration

of the criminal law'." 431 U.S. at 657, quoting from *DiBella v. United States*, 369 U.S. 121, 126 (1962).^{*} It takes no hyperbole to suggest that if pretrial appeals of either constitutional or statutory speedy trial issues were permitted, there would be few criminal cases that would proceed to trial without an interlocutory appeal. Such a result is not required to vindicate speedy trial rights and, most ironically, such a result would as a whole serve to defeat both defendants' and the public's interest in speedy trials by compounding delays or even creating delays that could easily exceed the stringent limits of the Speedy Trial Act.

Although we strongly urge that the speedy trial claim should be dismissed on the jurisdictional ground so that similar appeals are discouraged, we will nevertheless turn to the merits of the claim, which is frivolous in the extreme. Goldman argues that more than 180 days of non-excludable time under the Speedy Trial Act, 18 U.S.C. § 3161, et seq., have elapsed since the filing of the indictment. He reaches this conclusion by asserting that 163 days had elapsed before his trial began on August 23, 1977. He then calculates that when the mistrial was declared on September 6, 1977, there were only 17 days left for commencement of the retrial and when those days elapsed, the 180 day period was violated.

In making this argument, the defendant attempts to dismiss in a footnote the provisions of 18 U.S.C. § 3161(e) which state that if a "defendant is to be tried again following a declaration of the trial judge of a mistrial . . .

^{*} The policy against piecemeal review in criminal cases has been reflected in the Supreme Court's refusal to permit interlocutory appeals of issues involving suppression of evidence, *Cogen v. United States*, 278 U.S. 221 (1929), statutory immunity, *Heike v. United States*, 217 U.S. 423 (1910), sufficiency of the indictment, *Abney v. United States*, *supra*, or jurisdiction, *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943).

the trial shall commence within sixty days from the date occasioning the retrial becomes final." Without support in any authority or legislative history, Goldman offers a complicated explanation of this provision. Specifically, he argues that the 60 day period for retrial is available only if more than 60 days were left in the period for initially bringing the case to trial under § 3161(c). (Br. 25, footnote). Although the argument is absurd on its face, its ridiculousness became totally apparent when one considers that the ultimate time limits of the Act will require all trials to commence within a 60 day period. 18 U.S.C. § 3161(c). Thus, under the defendant's argument any case that initially went to trial at the end of the 60 day period could never be retried should a mistrial or reversal on appeal occur. The defendant's view, then, is that § 3161(e) was designed to make retrials of cases virtually impossible.

The pertinent legislative history offers no support at all for the defendant's far-fetched rendition of § 3161(e). The Senate Report's section-by-section analysis describes § 3161(e) as follows:

Subsection 3161(e) provides for time limits where there is a mistrial or where the defendant succeeds in collateral attack or appeal. As a general matter the provision requires that if the Government decides to retry the defendant in any of these situations the time limits begin to run on the date that the order occasioning the retrial becomes final.

Although there was little disagreement among witnesses appearing before the Subcommittee on Constitutional Rights as to the wisdom of commencing time limits with the date of the order giving rise to the retrial, there was controversy over whether 60 days, as provided in S. 895, was a sufficient amount of time. The Justice Department contended that 60 days was insufficient time to

prepare for a retrial after successful collateral attack, which could come years after the original trial. The section as it appears in S. 754 draws a distinction between cases of retrial following declaration by a trial judge of a mistrial or an order by the trial judge for a new trial; and cases where there is a retrial following a collateral attack or appeal. In the former case the speedy trial period is 60 days while in the latter case the period is also 60 days, except that the period may be extended if unavailability of witnesses or other factors resulting from the passage of time make trial within 60 days impractical. This dichotomy recognizes the difficulty of preparing a new case after successful collateral attack but would not allow inordinate delay where retrial is contemporaneous with the original trial as in a declaration of mistrial by the trial judge. Report of the Committee on the Judiciary on S. 754, Speedy Trial Act of 1974, S. Rep. No. 93-1021 at 33-34. (Emphasis added).

Under this description of the provision, there can be no doubt but that the statute means just what it says, namely, that upon a mistrial, 60 days are available within which to commence the retrial.

Finally, although it is apparent that Goldman's claim under the Speedy Trial Act lacks all merit, even if he were able to show a violation of the Act, he would be entitled to no relief. The sanctions of the Act do not go into effect until July 1, 1979. 18 U.S.C. § 3163(c). Until that time, a violation of the Act provides no basis for dismissing an indictment. *United States v. Carini, supra*.

CONCLUSION

The order of the District Court denying the motion to dismiss on double jeopardy grounds should be affirmed. The appeal of the speedy trial issue should be dismissed for lack of jurisdiction.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

AUDREY STRAUSS,
DANIEL J. BELLER,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAWRENCE B. PEDOWITZ, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 23rd day of January, 1978,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

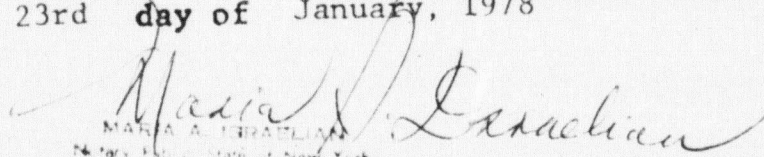
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99 Park Avenue
New York, New York 10016

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.


LAWRENCE B. PEDOWITZ

Sworn to before me this

23rd day of January, 1978


MARIA A. ISRAELIAN
Notary Public, State of New York
No. 4527851
Qualified in New York County
Term Expires March 31, 1979

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAWRENCE B. PEDOWITZ, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 23rd day of January, 1978,
he served a copy of the within brief by placing the same
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And deponent further says that he sealed the said envelope
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Lawrence B. Pedowitz

Sworn to before me this

23rd day of January, 1978.

Maria A. Isaacson

MARIA A. ISAACSON
Notary Public, State of New York

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